IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.1756 OF 1997
Date of decision: 3.4.2007

State of Punjab and others

…..Appellant

v.

Dr. Ram Kumar

…..Respondent

CORAM: HON'BLE MR. JUSTICE ADARSH KUMAR GOEL

Present: Mr. JS Dhillon, DAG, Punjab for the appellant.
Mr. Karan Nehra, Advocate, for the respondent.

JUDGMENT:

The State has filed this second appeal against decree for reinstatement passed in favour of respondent-plaintiff, reversing the view taken by the trial court, dismissing the suit.

Learned counsel for the State, at the outset, submitted that following substantial question of law arises for consideration:-

> "Whether the lower appellate court was justified in declaring the order of dismissal of the respondent from service void when the charge of absence from duty was clearly proved on admitted facts from the application of the plaintiff Ex.P7 dated 27.5.1987 and his legal notice Ex.D7 dated 31.7.1989, whereby the plaintiff stated that he was unable to

continue in service and may either be granted leave to allow him to do private practice or be given premature retirement?"

I have heard learned counsel for the parties on this question.

Facts:

The suit filed by the respondent-plaintiff challenges order of dismissal from service Ex.P6 dated 22.5.1990. He was given charge sheet dated 15.4.1988 for misconduct for absence from duty. An enquiry was duly held and vide his report dated 18.5.1989, the Enquiry officer held the charge to be proved. Notice dated 17.7.1989 was issued to the plaintiff, proposing punishing of dismissal, to which he gave his reply dated 31.7.1989.

Case of the plaintiff is that he joined service as Veterinary Surgeon on 23.11.1976. He applied for earned leave from 1.9.1986 to 31.10.1986. Even though, leave was not formally sanctioned, he was relieved on 31.8.1986 and in his place, Dr. Harbhajan Singh was deputed. The plaintiff sought extension of leave from time to time and presumed that his leave was sanctioned. He came to know that his leave had actually been rejected. He joined his duties from 23.5.1987 and 27.5.1987 and on 27.5.1987, sought premature retirement. He deposited one month's salary and relinquished the charge. He gave application

Ex.P7, to the effect that he could not continue in job due to family circumstances. Ex.P7 reads as under:-

> "The Secretary,
> Punjab Govt. Animal Husbandry Deptt.,
> Pb,Chandigarh.
>
> Sub: Premature retirement.
>
> Memo:
> With due respect,it is submitted that I joined The Deptt. Of Animal Husbandry, Punjab as Vety. Asstt. Surgeon on 23.11.1976. Now it has become difficult for me to continue in the job as Vety Officer due to my family circumstances.
> I therefore request you to allow me premature retirement from service with effect from 28.5.1987. I have deposited one month's salary in the office of Dy.Director, Animal Husbandry, Sangrur vide receipt No.497693 dated 27.5.1987.
>
> ---
> Book No.A
> Thanking you,
> Yours faithfully,
> sd/-
> (Ram Kumar)
> 27.5.1987
> Civil Vety Hospital,
> Bhawanigarh."

He also gave legal notice Ex.D7 dated 31.7.1989, to the effect that he may be either allowed to do private practice by remaining on leave or be allowed premature retirement. This prayer was rejected. He was given a charge sheet and dismissed from service. The relief sought was that order of dismissal from service was not binding on the plaintiff and he was entitled to salary for the period from 1.9.1986 to 22.5.1987 also.

The State contested the suit and stated that leave sought by the plaintiff was for doing private practice from 1.9.1986. He proceeded on leave without waiting for the sanction. Instructions permitting private practice were withdrawn. As per rules, premature retirement before 20 years of service was not permissible and that after 1.9.1986, except for four days from 23.5.1987 to 27.5.1987, the plaintiff had never served and was absent from duty. Order of dismissal from service was fully justified and was preceded by prompt enquiry. Due procedure was followed.

Following issues were framed:-

"1. Whether the plaintiff is entitled to declaration as prayed for? OPP.
2. Whether the plaintiff was not entitled for leave for doing private practice? OPD
3. Whether the notice under section 80 CPC was duly served, if not, to what effect? OPP
4. Relief."

Issue Nos. 1 and 2 were taken up together. It was held that after duly taking leave, Veterinary Surgeons were permitted to do private practice as per instructions Ex.P1. The plaintiff sought such leave but was never granted. Later on, instructions permitting private practice were withdrawn vide Ex.D1 dated 7.2.1989. Though, leave applications were recommended, the sanctioning

authority did not permit the same. The leave could not be claimed as of right, in view of Rule 8.15 of the Civil Services Rules, Volume I. Vide Ex.D2 dated 18.4.1987, leave was refused. The plaintiff applied for premature retirement, for which he was not eligible. In para 7 of the judgment, instructions regarding permissibility of voluntary retirement prior to completion of 20 years of service were mentioned. The said para is as under:-

> "7.....The Punjab Government issued instructions bearing No.4427-2PP-78/17892 dated 7.6.1978 that a Govt. employee can seek voluntary retirement after completing twenty years qualifying service. In view of the above instructions,it can be safely said that the plaintiff having joined his service under the Punjab Government on 23.11.1976, was not having a qualifying service of 20 years on 27.5.1987 when he filed the application (Ex.P7) for his premature retirement."

As a result of the above finding, the suit was dismissed.

On appeal, the lower appellate court reversed the finding of the trial court, by holding that the plaintiff was not given due opportunity to cross-examine the witnesses and to lead evidence. The leave had been duly recommended and the plaintiff had joined duty, when required. Declaration was granted that the plaintiff be deemed to be in service w.e.f 1.1.1986 and he be

considered on leave of the kind due from 1.9.1986 to 22.5.1987. Order of dismissal dated 22.5.1990 was set aside. He was granted benefit of continuity of service but in view of statement of the plaintiff, back wages were denied.

Contentions:

Learned counsel for the State submitted that the plaintiff was informed that his leave had not been sanctioned vide letter Ex.D2 dated 1.4.1987 but he joined work only from 23.5.1987 to 27.5.1987 and never served thereafter. He sought premature retirement from 28.5.1987 vide Ex.P7 which was not permissible under the rules. Thus, even though, neither he was granted leave nor his payer for retirement was permissible nor he took any legal remedy, the plaintiff was illegally absent from duty. After two years and two months, he gave a legal notice stating that he be allowed to do private practice for which leave may be granted or he may be given pension. Legal notice was given only after charge sheet was served on the plaintiff. Thus, on the plaintiff's own showing, absence from duty for the period after 27.5.1987 till the date of charge sheet i.e. 15.4.1988, which absence continued even thereafter, remains undisputed on record. In any case, order of dismissal passed on charge of absence from duty for a long period, which stood proved from admitted facts could not be interfered with. Principles of natural justice cannot be

invoked when no prejudice is caused and no unfairness is shown to a person. Facts being clear on record from application of the plaintiff dated 27.5.1987, Ex.P7 on record and his legal notice Ex.D7 dated 31.7.1989, violation of natural justice could not be a ground for setting aside the order of dismissal. The substantial question of law, has, thus, to be answered in favour of the appellant-defendant and against the plaintiff-respondent. The plaintiff neither challenged the order declining leave nor challenged the order not granting voluntary retirement. He never got any salary after 27.5.1987 nor any pension and, thus, was clearly aware about the facts. He continued to do private practice.

Learned counsel for the respondent-plaintiff supported the judgment of the lower appellate court.

Earlier Order of this Court:

It may be mentioned that the appeal of the State was earlier allowed vide judgment dated 5.10.2004. The matter has been remanded by the Hon'ble Supreme Court with a direction to frame substantial question of law and then decide the case.

When the case was earlier heard, contention on behalf of the plaintiff was that for over stay on leave, punishment of dismissal was not justified. This argument was rejected with the following observations:-

“Learned counsel for the respondent-plaintiff supported the findings of the lower appellate court and submitted that the plaintiff could not be charged with misconduct when the department took three months to take a decision on leave and he had been relieved and a substitute appointed in his place. He submitted that leave should be taken to have been sanctioned for the initial period and subsequently, even if there was over-stay on leave, punishment of dismissal would be disproportionate to the charge. He also submitted that since enquiry was not fair, order of dismissal was vitiated. He relied upon following decisions:-

"i) State of Punjab and others, v. Ram Singh, AIR 1992 SC 2188 holding that the word 'misconduct' may involve moral turpitude, improper or wrong behaviour, unlawful behaviour, wilful in character, forbidden act, a transgression of established and definite rule of action or code of conduct but not mere error of judgment, carelessness or negligence in performance of the duty, the act complained of bears forbidden quality or character;

ii) UP State Road Transport Corporation v. Muniruddin, 1990(2) RSJ 696 (SC) - disciplinary proceedings will be

vitiated by non-supply of documents causing prejudice to the delinquent.

iii) The Gwalior Distt. Coop. Central Bank Ltd., Gwalior v. Ramesh Chandra Mangal and others, 1984(3) SLR 314 (SC), wherein on facts of the case, over-staying leave was held not to amount to misconduct.

iv) The State of Punjab and others v. Bakshish Singh, 1997(4) SLR 590 (SC), wherein it was held that it is for the disciplinary authority to pass appropriate punishment and civil court could not substitute its own view in the matter, absence from duty was a gravest act of misconduct.

v) In Union of India and others v. Giriraj Sharma, AIR 1994 SC 215, dismissal on account of overstaying leave for 12 days was held to be a harsh punishment.

vi) Sohan Lal v. State of Haryana and others, 1997(2) RSJ 216, The Punjab State and another v. Rachhpal Singh, 1993(4) RSJ 428 and Baldev Singh v. Deputy General Manager, PRTC, Patiala and others, 1993(2) RSJ 732 (by this

court) - In the given facts, the employee was reinstated without back wages.

After hearing learned counsel for the parties and perusing the record, I am of the view that the appeal has to be allowed.The plaintiff-respondent applied for leave from 1.9.1986 to 31.10.1986. Decision thereon was taken on 27.1.1987. Meanwhile, a substitute was appointed and the plaintiff was relieved and his leave application was duly forwarded on 21.8.1986 mentioning that leave was due to his credit. I am not inclined to accept the submission made on behalf of the State that grant or refusal of leave was an absolute discretion and an employee cannot proceed on leave unless sanction is granted. No authority can act arbitrarily and exercise of any power has to be consistent with the object of such power. Right to grant leave also carries with it duty on the part of the concerned authority to take expeditious decision and convey the same. It does not entitle the authority to sit tight over the matter for a long period and hold the employee responsible for absence from duty when a lower authority has recommended the leave, which is due and has provided a substitute. Absence of sanction cannot, therefore, be conclusive to uphold action against any employee. To this extent, there is merit in the submission made on behalf of the respondent but this is not the end of the matter in the present

case. The plaintiff was duly informed that his leave had not been sanctioned. After this intimation was sent, he was not justified in not reporting for duty till he received a telegram directing him to join duty. Even thereafter, the plaintiff did not show willingness to serve and vide his letter Ex.P.7 dated 27.5.1987 he stated that he should either be granted leave or retirement. This was repeated in his legal notice Ex.D.7 dated 31.7.1999. Though, this request was not accepted, he absented himself without any justification. This conduct cannot be upheld. The plaintiff had no such right to force the department to sanction leave or allow him to retire. Absence of the plaintiff by taking this stand clearly amounted to misconduct. On admitted facts and on the stand of the plaintiff himself, he had misconducted. Admittedly, he failed to join duty after rejection of leave on 27.1.1987 and he joined only on 23.5.1987 and worked for four days.Even thereafter, he did not serve the department and on 27.5.1987 took a stand that on account of his family circumstances, he could not continue the job. Having taken this stand that he was unable to serve in his job, followed by legal notice Ex.D.7, the plaintiff cannot be heard to say that he was not absent from duty. In spite of his prayer having not been accepted, he did not join duty. This aspect of the matter having not been kept in mind by the lower appellate court, the view taken by the lower appellate court is clearly perverse.

It has been held by a Constitution Bench of the Apex Court in Managing Director, ECIL v. B.Karunakar, (1993) 4 SCC 727 as under:-

"...The courts should avoid resorting to short cuts. Since it is the Courts/Tribunals which will apply their judicial mind to the question and give their reasons for setting aside or not setting aside the order of punishment, (and not any internal appellate or revisional authority), there would be neither a breach of the principles of natural justice nor a denial of the reasonable opportunity. It is only if the Court/Tribunal finds that the furnishing of the report would have made a difference to the result in the case that it should set aside the order of punishment..." (Para 24).

The above principles were reiterated by the Apex Court in State Bank of Patiala and others v. S.K.Sharma, AIR 1996 SC 1669. It was also observed therein that ultimate object is to ensure fair hearing and avoid failure of justice. The court has to balance public interest with the requirement of natural justice.

A Constitution Bench of the Apex Court in J.M.Ajwani v. Union of India, 1967 SLR 471, observed as under:-

"...The appellant never denied the truth of the statement attributed to him and those statements established the case of the State against him. It would be difficult to hold that because the Enquiry Officer did not act strictly according to the rules a fresh inquiry should be directed to enforce compliance with the Rules..." (Para 12).

Once on admitted facts, misconduct is proved, any procedural violation cannot be held to have prejudiced the case of the delinquent. Judgments of the Apex Court in Gwalior Distt.Coop Central Bank and Giriraj Sharma's cases (supra) do not advance the case of the plaintiff. It cannot be taken to be a proposition of law that any amount of absence from duty by overstaying leave could be condoned. In Giriraj (supra), overstaying leave was for 12 days. In Gwalior Distt.Coop.Central Bank(supra), on facts, overstaying of leave was held not to be misconduct. It cannot be inferred that overstaying of leave can never be misconduct on any set of facts. Judgments relied upon about reinstatement without back wages are also on facts and no

> proposition of law can be laid down that an employee dismissed for misconduct must be reinstated merely because, he is not interested in back wages."

Stand of the Respondent-Plaintiff:

Now a different counsel has been engaged by the plaintiff, who submitted that after receiving letter Ex.D2 on 30.4.1987 regarding cancellation of leave, the plaintiff applied for premature retirement and deposited one month's salary and handed over the charge and, therefore,he was entitled to pension. He was misled by his senior and was under bonafide mistake and thus, charge of absence from duty was not proved. He has placed reliance on a judgment of this Court in **Mehar Singh v. State of Punjab and others,** 2003(1) SCT 453, wherein it was observed that after putting more than 10 years of service, the petitioner therein was entitled to pension and gratuity under Rule 6.16 of the Punjab Civil Services Rules, Volume II. It was held that since gratuity and pension was payable after rendering service of 10 years, the same was payable even after a person voluntarily took retirement or resigned.

Learned counsel for the plaintiff-respondent has also relied upon judgment of this Court in **Ganga Bishan v. State of Haryana**, 1994(3) PLR 691, to submit that when a person

becomes entitled to grant of pension, he is also entitled to grant of gratuity, as per Rule 6.16 of the Punjab Civil Services Rules, Volume II.

Findings:

Facts are clear on the record. Though recommended, leave for doing private practice sought by the plaintiff, was never granted. Later on, instructions permitting private practice were withdrawn. The plaintiff continued to remain absent even after 27.5.1987 even though, he knew that his leave had not been granted and also after charge sheet dated 15.4.1988, even-though he knew that his prayer was not granted. Confusion, if any, during earlier period could no longer be a defence to absence from duty after express rejection of leave and after charge sheet, clearly implying that prayer for voluntary retirement had not been accepted. Absence from duty was clearly proved as the plaintiff was doing private practice and he expressly stated that he was not in position to serve. Mere act of making an application for voluntary retirement was not enough and the rules did not allow voluntary retirement before completion of 20 years of service. In any case, order of dismissal could not be interfered with. The plaintiff has not sought the relief of pension. The said relief is also not admissible in law.

Letter of plaintiff Ex.P7 has already been reproduced in

the earlier part of the judgment, which shows that the plaintiff expressed his inability to continue in service. This was reiterated in legal notice Ex.D7 dated 31.7.1989. Ex.D2 clearly shows that the leave was not sanctioned. Ex.D1 shows that instructions regarding private practice were withdrawn. As noticed earlier, it is not an issue merely of absence from duty prior to withdrawal of instructions or prior to rejection of leave but absence from duty continued even after the leave was expressly declined and instructions for private practice were withdrawn. The plaintiff had no vested right to continue private practice or to continue on leave even after the leave application was expressly declined. In these circumstances, misconduct of the plaintiff was established on undisputed facts. The lower appellate court committed an error in holding that order of dismissal of the plaintiff was void and that leave having been recommended and the plaintiff having applied for voluntary retirement, the plaintiff was not absent from duty. Finding recorded by the trial court that before 20 years of service, the plaintiff was not entitled to voluntary retirement, has not been reversed. Finding of absence of opportunity was not enough for holding the order of dismissal to be void unless it could be held that the plaintiff had a right to remain absent or had a right to seek voluntary retirement which may have justified his absence from duty after 27.5.1987. Action taken on facts, admitted by the

plaintiff, could not be held invalid for absence of opportunity. Finding of the lower appellate court is perverse and cannot be legally sustained.

Contention of learned counsel for the plaintiff that since the plaintiff's application for voluntary retirement was never rejected, he was entitled to remain absent, is without any merit. The rules did not provide for seeking of voluntary retirement and mere making an application which has not been shown to be maintainable, was not enough to justify absence. In any case, the plaintiff did not take any remedy against non-grant of permission for premature retirement and did not join even after charge sheet. Rather he gave legal notice that he could not join.

The judgment relied upon by the learned counsel for the plaintiff may now be discussed. In **Ganga Bishan**'s case**,** 1994(3) PLR 691, prayer for voluntary retirement had been allowed unlike the present case and this Court directed that pension be granted as it was held that the plaintiff having already been retired, plea that voluntary retirement was not permissible, could not be allowed to be raised. This judgment is, thus, distinguishable. In **Mehar Singh's** case (supra), relying upon Rule 6.16 of Punjab Civil Services Rules, Volume II, it was held that once pension and gratuity was permissible after 10 years of service, the same could not be denied to a person who resigns. It was observed that

resignation was at par with voluntary retirement. This view was disapproved in a later DB judgment of this Court in CWP No.8592 of 2003 (**Shashi Kanta v. State of Haryana and others**), decided on 16.8.2004, in view of different view taken in a judgment of the Hon'ble Supreme Court in **Reserve Bank of India and another v. Cecil Dennis Solomon and another,** (2004) 9 SCC 461. The relevant observations in **Shanti Kanta's** case (supra) are as under:-

> "Learned counsel for the petitioner relied upon a judgment of a Single Bench of this Court in **Mehar Singh v. State of Punjab and others,** 2003(1) SCT 453, to submit that resignation has the same effect as that of retirement.
>
> We are unable to accept this contention. There is express exclusion of an employee who resigns or is removed or dismissed from service, from payment of gratuity. In **Reserve Bank of India and another v. Cecil Dennis Solomon and another,** JT 2003(10) SC 156, it was observed:-
>
> > "9. In service jurisprudence, the expressions superannuation, voluntary retirement, compulsory retirement and resignation convey different connotations. Voluntary retirement and resignation involve voluntary acts on the part of the

> employee to leave service. Though both involve voluntary acts, they operate differently...”

The judgment in **Mehar Singh'**s case (supra) is, thus, not applicable. It may also be made clear that Rule 6.16 of the Punjab Civil Services Rules, Volume II, does not deal with eligibility for voluntary retirement but only with pension and Sub Rule 3 provides for payment of proportionate pension to an employee, who, at the time of retirement, has rendered qualifying service of 10 years or more. The said rule merely lays down the scale of pension and is applicable to a situation where an employee has retired. It does not provide for eligibility for voluntary retirement. Eligibility for voluntary retirement is governed by the government instructions relied upon in para 7 of the judgment of the trial court, quoted in the earlier part of the judgment. No contrary instruction or rule has been shown. Thus, it cannot be held that the plaintiff was entitled to pension on the ground that he had made an application for voluntary retirement, irrespective of his eligibility to seek voluntary retirement.

The question of law formulated has, thus, to be decided in favour of the State-defendant and against the respondent-plaintiff.

For the above reasons, the appeal filed by the State

succeeds. The impugned decree of the lower appellate court is set aside and the suit filed by the respondent-plaintiff is dismissed.

April
, 2007 (Adarsh Kumar Goel)
'gs' Judge